IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 619

STEVE ASHTON,

Petitioner.

against

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

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On the Petition,
EPHRAIM LONDON,
DAN JACK COMBS,
HELEN L. BUTTENWIESER.

INDEX.

Table of Cases.

CONSTITUTIONAL PROVISIONS AND STATUTES.

MISCELLANEOUS.

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The Petitioner, STEVE ASHTON, respectfully requests a Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky to review a judgment of that Court which affirmed (with three of the seven Judges of the Court dissenting) Petitioner's conviction of criminal libel.

Opinions Below.

Petitioner was found guilty after trial by a jury in the Perry Circuit Court of Kentucky (R. 12c). No opinion was given when the judgment of conviction was entered.

The opinion of the majority of the Court of Appeals of the Commonwealth of Kentucky affirming the judgment of conviction and the dissenting opinion of the Chief Justice and of the Judges of that Court who voted to reverse the judgment are set out in Appendix A to this Petition. The opinions have not been officially reported.

Jurisdiction.

The judgment of the Court of Appeals of the Commonwealth of Kentucky sought to be reviewed was entered June 18, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

The Questions Presented for Review.

1. Whether Petitioner's conviction in Kentucky of the common law crime of libel (which crime had been defined in several different ways in the few cases in Kentucky in which it was considered) violated the requirements of due process and the Constitutional guarantee of freedom of the press.

2. Whether the Trial Court's definition of the common law crime of criminal libel was so vague and indefinite as to violate the requirements of due process, and make criminal the publication of matter within the protection of the First and Fourteenth Amendments.

3. Whether convicting Petitioner of criminally libelling public officials without proof that Petitioner was aware of the falsity of the statements attributed to him and without proof that Petitioner published the statements,

was a denial of due process and a violation of Petitioner's right to freedom of the press.

4. Whether Petitioner was deprived of due process and denied his Constitutional right of expression by his conviction of criminal libel, when it was shown on the trial that Petitioner's statements with respect to one of the complaining witnesses were true.

5. Whether Petitioner was denied due process and was deprived of his Constitutional right to freedom of the press by the prosecutor's failure, and the Court's refusal to direct the prosecutor, to advise Petitioner which statements made by Petitioner were said to be libellous and in what respects such statements were false, and in which manner and to whom the statements were published.

6. Whether the affirmance of Petitioner's conviction by the Kentucky Court of Appeals under a definition of the common law crime of criminal libel, different from that of, and in conflict with the definition applied by the Trial Court, constituted a denial of due process and of equal protection of the laws and of Petitioner's right to a hearing on appeal of the question of the Constitutionality of the law as it was applied in his case.

7. Whether a State's conviction and punishment of a person for making inaccurate and derogatory statements about the official conduct of public officials violates the First and Fourteenth Amendment guarantees of freedom of the press.

Constitutional Provisions and Statutes Involved.

The Federal Constitutional provisions involved are the First and Fourteenth Amendments to the United States Constitution.

The Constitutional provisions of the Commonwealth of Kentucky and the Statutes that are involved are:

Constitution of Kentucky.

"§9. *Truth May Be Given In Evidence In Prosecution for Publishing Matters Proper for Public Information; Jury to try Law and Facts in Libel Prosecutions.* In prosecution for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the Court as in other cases."*

Kentucky Revised Statutes, Chapter 431. Crimes and Punishments.

"§431.075. *Common Law Offenses, Penalties for.* Any person convicted of a common-law offense, the penalty for which is not otherwise provided by statute shall be imprisoned in the County jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both."

* Under the earlier common-law rule in Kentucky the truth of the matter alleged to be libellous was inadmissible as a defense in a prosecution for libel. The State Constitutional provision was adopted to enable a defendant charged with libel to plead truth in justification. *Tracy* v. *Commonwealth*, 87 Ky. 578, 584 (1888).

Statement of the Case

The following, with minor additions, is the statement of the facts to the Court below, to which the attorney for the Commonwealth of Kentucky agreed.

Petitioner, Steve Ashton, was indicted for publishing on March 22, 1963, in Perry County "a false and malicious publication which tends to degrade or injure Sam L. Luttrell, Charles E. Combs and Mr. and Mrs. W. P. Nolan.*" At the time of the alleged libel, Sam L. Luttrell was Chief of Police of Hazard, Kentucky (T. 73), Charles E. Combs was Sheriff of Perry County (T. 139) and Mrs. Nolan was co-owner and co-publisher of a newspaper, the Hazard Herald (T. 111). The alleged libellous matter appeared in a mimeographed pamphlet entitled "Notes on a Mountain Strike" (Commonwealth Exhibit 1, T. 84).

Ashton was 20 years old at the time of the alleged offense (T. 178). He had been a student at Oberlin College in Ohio for two and a half years, and left college in February 1963 to come to Hazard, Kentucky (T. 178). There was, at the time, "a period of strife between union and non-union miners" in the area (App. A, p. 11) and Petitioner came in response to an appeal for food, clothing and help for unemployed miners. The appeal was made on a program telecast over a national television network (T. 182).

In his instructions to the jury, the Trial Judge stated that Petitioner was charged with having made the following defamatory statements about Police Chief Luttrell in the pamphlet "Notes on a Mountain Strike":

> " 'Six weeks ago I witnessed a plot to kill the one pro-strike city policeman on the Hazard Force.

* The indictment as against Mr. Nolan was dismissed (T. 112).

> Three of the other cops were after him while he was on night-duty. It took 5 pickets guarding him all night long to keep him from getting killed, but they could not prevent him from being fired, which he was three weeks ago. Another note on the City Police: The Chief of the force, Bud Luttrell, has a job on the side of guarding an operator's home for $100 a week. It's against the law for a peace officer to take private jobs' " (T. 204).

The defense proved that a number of the statements were true. It was shown that people known to Chief Luttrell had considered killing a police officer who sympathized with the striking miners. Kilburn, the officer in question, testified that he had been a Police Lieutenant on the Hazard force, working under Luttrell (T. 188). He testified that he had been told by Chief Luttrell that he would be killed by two men, one a policeman, unless he resigned (i. e., "made a move") (T. 188). On direct examination Luttrell denied that he told Kilburn he would be killed "if he didn't make a move" (T. 201) but on cross-examination by the Court, Luttrell admitted that he told Kilburn that his life might be in danger because of statements he had made (T. 202).

Luttrell indicated that he was libeled by the statement that one night five pickets were needed to guard a policeman. Luttrell testified, in response to a question, that there was no truth whatever to a statement that it took "three (sic) men to guard this one city policeman" (T. 87). However, Charles Moore, a member of the Miners' Relief Committee, testified that he and other pickets had in fact guarded Kilburn's home one night (T. 196, 197).

Luttrell denied, and the defense did not prove that he had an outside job guarding a mine operator's home (T. 87, 88).

According to the Trial Court's instructions to the jury the defamatory statement allegedly made by Petitioner about Sheriff Combs was:

> " 'The High Sheriff has hired 72 deputies at one time, more than ever before in history; most of them hired because they wanted to carry guns. He, Sheriff Combs, is also a mine operator—in a recent Court decision he was fined $5,000 for intentionally blinding a boy with tear-gas and beating him while he was locked in a jail cell with his hands cuffed. The boy lost the sight of one eye completely and is nearly blind in the other. Before the trial Sheriff Combs offered the boy $75,000 to keep it out of court, but he refused. Then for a few thousand dollars Combs probably bought off the jury. The case is being appealed by the boy to a higher court—he wants $200,000. Combs is now indicted for the murder of a man—voluntary manslaughter. Yet he is still the law in this county and has the support of the rich man because he will fight the pickets and the strike. The same is true of the State Police. They escort the scabs into the mines and hold the pickets at gun-point.' " (T. 204, 205)

Sheriff Combs conceded the truth of many of the statements made about him. He admitted that he was a mine operator, while acting as High Sheriff (T. 141) and that he and the State police escorted miners through the picket lines (T. 146). He admitted that a boy was beaten and gassed, while in jail in his (the Sheriff's) custody, and that the boy recovered a judgment against him for $5,000, because of the beating (though he denied that he was present at the time the boy was injured and the tear gas was used) (T. 141, 149). The Sheriff also admitted that he was under indictment for manslaughter, as stated in the Notes (T. 149) and that he had not been removed from office (T. 142).

Sheriff Combs also said that he never had as many as 72 deputies, and that he did not hire deputies "exactly" because they wanted to carry guns. (He said *he* wanted them to carry guns) (T. 140, 141). He admitted, however, to having about 48 deputies "on the books", none of whom were unemployed miners (T. 147, 148). The record does not reveal why an issue was made with respect to the number of persons officially and unofficially deputized by the Sheriff, for it was conceded that it had been the policy "if somebody wants to be a deputy sheriff, why, they kind of put 'em on" (T. 94).

The Sheriff denied, and the defense did not prove that he offered $75,000 in settlement of the charges against him, and that he "probably bought off" the jury (T. 141, 142).

The Petitioner was charged, according to the Court's instructions to the jury, with having made the following defamatory statement about Mrs. Nolan:

> " 'The town newspaper, the Hazard Herald, has hollered that "the commies have come to the mountains of Kentucky" and are leading the strike. The Herald was the recipient of over $14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however, the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only $1,100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still' " (T. 205).

Mrs. Nolan conceded that her newspaper had taken the position that the miners' strike was fomented by Communists (T. 138) and that it published the quoted statement (T. 120). She admitted that the Hazard Herald received. not $14,000 but about $20,000, and some food and clothing, as a result of a televised program about unemployed miners (T. 121, 122); and that only $1,100 of the money was paid to the pickets (T. 133, 134). She said that she did not know whether the money, food and clothing received by the Hazard Herald had been distributed to scabs (T. 116).

No evidence was offered with respect to the distribution of the pamphlet either by the Petitioner, Ashton, or by any other person. A number of copies were found by the police in a room in a tavern and all were seized by the police (T. 154, 83). Ashton was in the room when the pamphlets were found and taken (T. 83). Mrs. Nolan said she *believed* her husband found a copy of the Notes in her door, but did not know who placed it there (T. 134, 135). She was unable to state when the pamphlet was found because, as she put it, "We had gotten so used to it" (i. e. to such communications) (T. 118).

There was also testimony that 50 or 60 copies of the Notes on a Mountain Strike were "prepared to be mailed" when they were taken by the police (T. 86). The Police Chief, Luttrell, admitted, however, that he did not know of anyone who received a copy of the paper other than the complaining witnesses and the police who were sent to pick up the copies (T. 88).

Before the jury retired, it was instructed by the Court "that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictible" (T. 208). The jury returned a verdict of guilty, concurred

in by 10 of its 12 members,* and fixed Ashton's punishment at "six months in prison jail (sic) and $3,000 fine" (R. 18). A judgment in conformity with the verdict was recorded in the Court's Book of Criminal Trials on November 21, 1963 (R. 18).

The Manner in Which the Federal Questions Sought to be Reviewed were Raised

(1) The question of whether the conviction of Petitioner for violation of the common law crime of libel violated due process and the Constitutional right of freedom of expression, because the crime had not been clearly and consistently defined in authoritative opinions of the Kentucky Courts, was raised at the trial by motion to dismiss the indictment (R. 5) and in the briefs to, and argument before, the Kentucky Court of Appeals. The Trial Court, by denying the motions to dismiss, held in effect that Petitioner's Constitutional rights were not violated. The Kentucky Court of Appeals passed on the question and concluded that the common law crime of criminal libel "survived" the federal Constitution (App. A, p. 5). The question was also passed on in the dissenting opinion in the Court of Appeals in which it was said: "since the (common) law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky." (App. A, p. 16; matter in parenthesis ours).

(2) The question of whether the law as construed in this case is vague and indefinite and violates the First and Fourteenth Amendment guarantees of freedom of the press,

* The trial minutes did not show the number of jurors who agreed upon the verdict. The Attorney General for the Commonwealth stipulated, on the argument of the appeal, that only 10 of the jurors had in fact concurred in the verdict of guilty.

was raised by objections to the Court's instructions to the jury (T. 203) and in the briefs to and argument before the Kentucky Court of Appeals. The Kentucky Court of Appeals noted in the opinion of the Court that the "principal ground urged for reversal is that the nature of the offense was so 'vague' and 'inclusive' that appellant's conviction violated his constitutional rights of freedom of speech and due process. The Court concluded that the definition of the crime is not unconstitutionally "uncertain." (App. A, p. 9).

(3) The question of whether Petitioner's conviction of criminal libel was without due process and infringed the Constitutional guarantee of freedom of the press because of the absence of any proof of malice or of publication of the libel, was raised in the briefs and argument to the Kentucky Court of Appeals. The Court of Appeals passed on the question and ruled, without reference to the evidence, that publication was proved (App. A, p. 2) and it ruled that "*independent* proof of malice" was not required and that the jury in the Trial Court was reasonably justified in concluding that Petitioner was actuated by actual malice from certain facts of the case. (App. A, pp. 10-11).

(4) The question of whether Petitioner was deprived of due process and denied his Constitutional right to publish freely because he was judged guilty pursuant to a single general verdict and the evidence did not support the charge that he published false matter degrading or injuring Mrs. W. P. Nolan, was raised in the brief to, and argument before the Kentucky Court of Appeals. The Court of Appeals passed on the question in holding "there was sufficient evidence that the statements accusing her of a breach of trust in the distribution of certain funds were in essence false." (App. A, p. 2).

(5) The question of whether Petitioner was denied Due Process by the failure of the indictment and of the Court (in denying Petitioner's motion for particulars) to advise Petitioner of the particular statements for which he was being prosecuted and in what respects the statements were false and how and to whom it was published, was raised in the Trial Court by motions to dismiss the indictment (R. 3-4) and for a bill of particulars (R. 11-12). The Trial Court in effect ruled that Petitioner was not denied due process by denying both motions. The question was raised in the Kentucky Court of Appeals in the brief to, and argument before the Court. The Court of Appeals, in passing on the question, held that the denial of Petitioner's motion for a bill of particulars was "error" but added "There is no suggestion defendant was not fully aware that he was being prosecuted for the libelous matter, concerning the specifically named prosecuting witnesses, which appeared in 'Notes on a Mountain Strike', or that he did not have a copy of this printed material. . . . We cannot find the denial of defendant's motion in any way prejudiced his defense" (App. A, p. 12).

(6) The question of whether Petitioner was denied Due Process by the affirmance, by the Kentucky Court of Appeals, of Petitioner's conviction under a different definition of the crime from that applied by the Trial Court, was not raised below in that manner. The question could not have been raised before the Court of Appeals made its determination in this case. However, a related issue was argued before the Court, and in a letter sent to the Chief Justice and the Judges of the Kentucky Court of Appeals, at their request, Petitioner wrote:

> "To retroactively change the definition of a crime on the appeal from a conviction of the offense would also deny the opportunity to present an effec-

tive defense. A penal statute must state precisely what conduct is prohibited so that a person may know in advance what actions are proscribed and what defense may be interposed. *Lanzetta* v. *New Jersey* (1939), 306 U. S. 451, 453. One charged with offending against a penal statute cannot be compelled to assume the burden of a change in the meaning of the law by subsequent construction. *Connally* v. *General Construction Co.* (1926), 269 U. S. 385, 391, 392-393, 395; *Thomas* v. *Collins* (1945), 323 U. S. 516, 529-30, 534-35."

(7) The question of whether the prosecuting, imprisoning and fining of Petitioner for making false, derogatory statements about the official conduct of public officials violates the Constitutional guarantees of freedom of the press, was raised in the trial court by motion to dismiss the indictment (R. 11-12). The Trial Court, by denying the motion, held in effect that such prosecution and punishment did not inhibit freedom of the press. The question was raised in the brief to, and argument before, the Court of Appeals and the Court ruled against that argument by affirming the conviction.

Reasons for Allowance of the Writ.

The questions raised are substantial in that they involve the fundamental right to freedom of the press and the right of untrammelled political discussion and the right to publicly criticize public officials (who in this case had been guilty of improper conduct).

Preliminary Statement

One of the questions raised that this Court has not yet passed on, is whether the Constitution prohibits enforcement of a State common law rule making certain com-

munications criminal, when the common-law doctrine has not been clearly and consistently set out in State Court opinions, and is a protean concept being formulated on a case to case basis.

Another question presented that this Court has not yet passed on, is the nature and quantum of proof of publication, that the Constitution requires to sustain a conviction for criminal libel.

One of the questions presented here was determined by this Court in *Garrison* v. *Louisiana*, 379 U. S. 64, and *New York Times Co.* v. *Sullivan*, 376 U. S. 254. The decision in the Court below sustaining a conviction of a criminal libel, which the Trial Court defined as "any writing calculated to create disturbances of the peace, corrupt public morals, or lead to any act which when done is indictible" (T. 208) is in conflict with the precepts of the *Garrison* and *Sullivan* cases.

Another issue raised here that was determined by the courts below in a manner inconsistent with this Court's opinion in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, relates to the nature of the proof required to sustain a showing of actual malice in a prosecution for criminally libelling a public official. In the *Sullivan* case, the Court held that in a case involving libel of public officials malice could not be presumed but was required to be proved (376 U. S. 254, at pp. 283-284). In the instant case the Court assumed that Petitioner acted with malice because Petitioner had opposed the position taken by the public officials in a dispute between non-union and union miners, and from the fact that Petitioner did not know the officials or ask them whether the statements made about them were true (App. A, p. 11).

Another question here presented that has not been decided by this Court is whether the Constitution requires a State prosecuting a defendant for criminal libel to advise

him of the statements for which he is prosecuted, and when and how they were published, and in what respects it is claimed they were false.

The Questions Presented are Substantial

I. Petitioner's conviction in Kentucky of the common law crime of libel (which crime had been defined in several different ways in the few cases in Kentucky in which it was considered) was a violation of due process and the Constitutional guarantee of freedom of the press.

It is a horn book rule that a criminal law must be sufficiently clear and definite that men of common intelligence will understand its meaning. The conviction of a person under a vague law violates one of the fundamental requirements of due process, namely, that one must have reasonable notice or an opportunity to learn that conduct is condemned by law before he can be punished for it. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391-393; *Stromberg* v. *California*, 283 U. S. 359, 369; *Winters* v. *New York*, 333 U. S. 507, 515, 518.

Where a vague law attempts to punish or regulate communication, it must be held unconstitutional also because it inhibits freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution. In *Winters* v. *New York*, 333 U. S. 507, Mr. Justice Reed, speaking for the Court, said (at p. 509):

> "A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished and such statute's inclusion of prohibitions

> against expressions protected by the principle of the First Amendment, *violates an accused's rights under procedural due process and freedom of speech or press''* (emphasis ours).

See also *Thornhill* v. *Alabama,* 310 U. S. 88, 96-98; *DeJonge* v. *Oregon,* 299 U. S. 353; *Niemotko* v. *Maryland,* 340 U. S. 268, 271-272, and *Smith* v. *California,* 361 U. S. 147, 150-151.

The rule, that a penal law that fails to give fair warning of the conduct that will be held criminal, violates the requirements of Due Process, applies with particular force to a common law crime that is not set out in the statute books, but is being formulated, as stated in the dissenting opinion in the Court below, ''on a case to case basis'' (App. A, p. 16). See *Cantwell* v. *Connecticut,* 310 U. S. 296; *Pierce* v. *United States,* 314 U. S. 306, 311; *Common Law Crimes in the United States,* 47 Colum. L. R. 1332; Brandt, *Seditious Libel; Myth and Reality,* 39 N. Y. U. L. R. 1.

We are not concerned here with a common law concept that, by a number of consistent interpretations and applications by the courts, has acquired definite and concrete meaning so that those within its purview may be deemed to have notice of its effect. Before Petitioner's conviction there were only six authoritative opinions by Kentucky courts that discussed or attempted to define the common law crime. Those cases were decided during the period from 1895 to 1927, and the definitions of the crime vary in the several opinions.

In *Tracy* v. *Commonwealth,* 87 Ky. 578 (1888), the Court held:

> ''Libel is a public wrong. The publication is in effect a breach of the peace; it produces public mischief and for that reason is an indictable offense. It is

> a breach of the peace whether published as to one or more persons'' 87 Ky. at 584.

In *Provident Sav. Life Assur. Soc.* v. *Johnson,* 115 Ky. 84 (1903), a civil suit for malicious prosecution for criminal libel, the Court said "a criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable.''

Browning v. *Commonwealth,* 116 Ky. 282 (1903), merely states that:

> ''. . . where a defamatory libel on the character of an individual will support an action for damages, the publication amounts to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society'' (116 Ky. at 285).

In *Commonwealth* v. *Duncan,* 127 Ky. 47 (1907), the Court said:

> "The rule as to what is libelous is thus stated in 2 Roberson, Crim. Law, 586: 'Libel is an offense at common law, and is defined to be any false and malicious publication which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or to bring him into contempt, hatred or ridicule, or which accuses him of any crime punishable by law, or of any act odious and disgraceful to society.' In 2 Bishop on Crim. Law, section 907, the crime is defined in these words: 'The offense of libel is founded on the doctrine of attempt. It is any representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.' '' (127 Ky. at pp. 52-53).

And *Cole* v. *Commonwealth,* 222 Ky. 350 (1927) the most recent Kentucky case on the subject (prior to the one at bar) defines criminal libel as:

> "*any* false and malicious publication, which tends to blacken the memory of one who is dead, or to degrade or injure one who is alive, or bring him in contempt, hatred, or ridicule, or which accuses him of any crime punishable by law, or of any act odious or disgraceful to society." (Emphasis ours, 222 Ky. at 358).

It cannot be said, on the basis of that body of case law, that the common law of criminal libel in Kentucky had the definiteness and clarity the Constitution requires of a penal law.

II. The offense of criminal libel as defined by the Trial Court in this case was so vague that Petitioner's conviction of disobeying the law was a denial of due process and infringed his constitutional right of communication.

The definition of the crime applied in this case was so broad and unclear as to permit the punishment of lawful conduct within the protection of the First and Fourteenth Amendments to the Constitution. The Court instructed the jury that Ashton was guilty of criminal libel if Notes on a Mountain Strike was "calculated to create disturbances (sic) of the peace, corrupt the public morals or lead to any act, which, when done, is indictible" (T. 208). No part of the Court's definition furnished any reasonably definite standard to guide the jury in its determination in this case. We must assume that the word *calculated* in the

Trial Court's definition refers to the probable consequence of the language, and not to the writer's intent, for his intent alone could not be punished. The jury then was left free to determine whether the language used in Notes on a Mountain Strike would *be likely* to influence the reader to breach the peace or to commit a criminal or an immoral act.

In *Winters* v. *New York,* 333 U. S. 507, 518-519 (1948), the Court held unconstitutionally vague a statute that prohibited the publishing of material "so massed as to become vehicles for inciting violent and depraved crimes against the person." The Court found "the specification of publications prohibited from distribution, too uncertain and indefinite" to sustain any criminal conviction (333 U. S. at p. 519). Although the language of the statute in the *Winters* case was, we believe, more informative than the definition in the instant case, the Court there found it was impossible for those subject to the law, or those charged with its enforcement, to know where to draw the line between allowable and forbidden publications and as a result innocent conduct might be punished, or a person might be dissuaded from publishing proper material in the belief that it came within the ambit of the law. "The clause," Justice Reed wrote, in *Winters* v. *New York,* 333 U. S. at p. 519, "proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person . . . It is not an effective notice of new crime. The clause has no technical or common-law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears . . . 'It leaves open, therefore, the widest conceivable inquiry, the scope of

which no one can foresee and the result of which no one can foreshadow or adequately guard against.' "

In *Garner* v. *Louisiana,* Mr. Justice Harlan wrote in his concurring opinion, in language directly applicable to the Trial Court's definition of criminal libel in this case (368 U. S. 157, at p. 202):

> "But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, *it cannot do so by means of a general and all-inclusive breach of the peace prohibition.* It must bring the activity sought to be proscribed within the ambit of a statute or clause 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' " (Emphasis ours.)

See also *Edwards* v. *South Carolina,* 372 U. S. 229, *Henry* v. *Rock Hill,* 376 U. S. 776 and *Cox* v. *Louisiana,* 379 U. S. 536.

It is doubtful if any law, even if precisely worded, could constitutionally punish a publication because the publication *might* lead to a breach of the peace. If people become disorderly after receiving a communication, the conduct of those participating in the disorder should be punished, but not the communication. (We are not here concerned with direct incitement to a violation of law.) The disorder or disturbance of the peace would arise from the violence of the audience's reaction, and the authorities would be obliged to restrain the audience, not to prohibit speech or expression. *Kunz* v. *New York,* 340 U. S. 290, 294, 295; *Terminiello* v. *Chicago,* 337 U. S. 1; *Hague* v. *C. I. O.,* 307 U. S. 496, 516.

If an utterance could be prohibited because it *might* arouse an audience to violence, then, as John Stuart Mill noted, the "least educated and most intemperate citizens would become the arbiters of permissible expression." John Stuart Mill, *On Liberty*, Chapter 2 (MacMillan). As Chief Justice Hughes said in *Near* v. *Minnesota*, 283 U. S. 697, 722:

> "The danger of violent reactions becomes greater with effective organization of defiant groups . . . and if this consideration warranted legislative interference with the national freedom of publication, constitutional protection would be reduced to a mere form of words."

The Kentucky Court of Appeals acknowledged, in its opinion below, that the "broad common law concept of what constituted a 'breach of peace' is no longer a constitutional basis for imposing criminal liability" (App. A, p. 8). It maintained, however, that the Trial Court's reference to that "obsolete" concept in its instructions did not violate Petitioner's constitutional rights because (1) the common law offense of criminal libel is no longer founded on the tendency of the defamatory words to cause a breach of the peace (App. A, p. 7) and (2) the requirement that the language lead to a breach of the peace was merely descriptive of the kind of derogation of persons that the common law condemned (App. A, p. 7).

Unfortunately for Petitioner, the Trial Judge and jury who tried him were not aware that the concept was obsolete or that it was merely descriptive of the language that was supposedly, in other respects, defamatory of the complaining witnesses. The jury was instructed that Petitioner was guilty of criminal libel if the language used by him with respect to the complaining witnesses was "false

and libellous" (T. 207) and was "known to be false and libellous" (T. 207) and the "legitimate inferences to be drawn from the language used . . . is false and libellous" (T. 207). The term libellous or criminal libel was then defined for the jury as "any writing calculated to create disturbances of the peace etc." (T. 208). It must be assumed that the jury, in finding the Petitioner guilty, believed that the crime consisted of the making of false statements that would tend to corrupt morals, or cause a breach of the peace or was likely to lead to an illegal act.

The phrase "calculated to . . . corrupt the public morals", in the Trial Court's description of publications that must be held criminal under the law, has also been held too indefinite to meet constitutional requirements when used in a statute regulating speech or press. *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684; *Musser* v. *Utah,* 333 U. S. 95; *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587* (decided under the caption *Superior Films* v. *Dept. of Education of State of Ohio*); *Holmby Productions, Inc.* v. *Vaughn,* 350 U. S. 870.*

The Court below, it will be recalled, also defined as criminally libelous "any writing calculated to . . . lead to any act which . . . is indictable". The clause "lead to any act which, when done, is indictable" is no more definite and has the same meaning as the phrase "tend to incite to crime" which, in *Winters* v. *New York,* 333 U. S. 507, was held too general to furnish the standards essential for the guidance of a court or jury.

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* The cited opinions are memorandum opinions. The statutes held unenforceable will be found in the opinions of the lower courts.

III. No evidence was offered to show that the statements about the Chief of Police and the High Sheriff were published with actual malice. Since the publication related to the official conduct of persons holding public office the conviction of Petitioner violated the Constitutional Guarantees of freedom of the press.

The statements that Petitioner allegedly published about the High Sheriff and the Chief of Police, were unpleasant, and may have been inaccurate in part,—(although substantially true). But they were all made as part of a document written to describe the conditions then existing in Hazard and Perry County, and to call to account the public officials who were thought responsible. It should be noted that the situation in Hazard was of public interest, and was the subject of one or two television programs broadcast nationally by Columbia Broadcasting Company (T. 121). The constitutional protection afforded statements made in criticism of the conduct of public officers extends, where the statements are not made with evil intent, to half truths, misinformation, exaggerations and inaccuracies. The protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP* v. *Button,* 371 U. S. 415, 445 (1963). "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates on the Federal Constitution* p. 571 (cited with approval in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, at p. 271).

In its opinion below the Kentucky Court of Appeals conceded that *New York Times Co.* v. *Sullivan,* 376 U. S. 254,

and *Garrison* v. *Louisiana*, 379 U. S. 64, require a showing of actual malice to support a recovery in a civil action, and a conviction in a criminal case, for the libelling of public officials (App. A, p. 10). The Court of Appeals ruled, however, (we believe erroneously) that *independent* proof of malice was not required (App. A, p. 10).

The Kentucky Court of Appeals found that the jury in this case was justified in concluding that Petitioner was motivated by actual malice because he "was a stranger in the community. He was not acquainted with the prosecution witnesses. He had not personally confronted them with their claimed misconduct. Some of the statements made about them were clearly defamatory and they were false. This was a period of strife between union and non-union miners, and the defendant (Petitioner) and the prosecuting witnesses were in opposing camps." (App. A, p. 11, matter in parentheses ours).

The facts, that Petitioner did not know the complaining witnesses and was unfamiliar with the place where they lived, did not warrant the inference that he bore them ill will. Nor may it reasonably be assumed that Petitioner was evilly disposed toward the complaining witnesses because they had opposing views about a dispute between mine workers—in which Petitioner was not directly involved. Petitioner's failure to confront the Police Chief and Sheriff with the statements about their misconduct is certainly not strange under the circumstances, and may not be held evidence of malice. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, this Court found that the newspaper's failure to check the accuracy of matter in an advertisement it published, and its failure to check the matter even against its own files, did not show malice with "the convincing clarity the constitutional standard demands" 376 U. S. at pp. 286-287. See also *Moity* v. *Louisiana*, 379 U. S. 201 (per curiam).

IV. The convicting of Petitioner of criminal libel without proof that Petitioner published the libel was a denial of due process and a violation of the right to freedom of the press.

A libel is not punishable as a criminal offense unless the libel has been published or distributed by the accused to some one other than the person said to have been denigrated. In the instant case the alleged libellous pamphlet offered in evidence was one of those seized by Police Chief Luttrell when he arrested the Petitioner Ashton (T. 83). Other copies were obtained by police officers, acting under the instructions of the prosecuting witness, Chief Luttrell (T. 78-80). The evidence that Mr. and Mrs. Nolan found a copy of the pamphlet in their door cannot be held proof of willing and knowing publication by the Petitioner, for there was no evidence that the copy was placed there by Ashton or at his instance.

Since there was no evidence that a single copy of the pamphlet was delivered or published to anyone by Petitioner, the judgment of conviction "constitutes a forbidden intrusion on the field of free expression" *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285.

V. The Petitioner's conviction of criminal libel violated the constitutional guarantee of freedom of the press for the statements made about the complaining witness, Mrs. Nolan, were true.

The statement made by Petitioner that was said to be "libellous and defamatory" of Mrs. Nolan was:

> " 'The town newspaper, the Hazard Herald, has hollered that " 'the commies have come to the mountains of Kentucky' " and are leading the strike. The

> Herald was the recipient of over $14,000 cash and several truckloads of food and clothing which were sent as the result of a CBS-TV show just before Christmas. The story was on the strike and aid was supposed to be sent to the pickets in care of the Hazard Herald, however the editor, Mrs. W. P. Nolan, is vehemently against labor—she has said that she would rather give the incoming aid to the merchants in town than to the miners. Apparently that is what she has done, for only $1100 of the money has come to the pickets, and none of the food and clothes. They are now either still under lock and key, or have been given out to the scabs and others still,' " (T. 205)

To justify criminal prosecution for libel, the defamation should, we believe, charge serious vice or disgraceful behavior or scandalous misconduct "which exceptionally disturbs the community's sense of security" (quoted in *Garrison* v. *Louisiana*, 379 U. S. 64 at p. 70). There is no indication, in any of the Kentucky cases dealing with criminal libel, of the nature of the defamation that may be punished (other than that it tend to lead to a breach of the peace). Although the charge against Mrs. Nolan does not appear sufficiently grave to warrant imprisoning the Petitioner for having made it, the Kentucky Court of Appeals held the statement punishable because it found that it, in effect, accused her of a breach of trust (App. A, p. 2).

Assuming that the quoted language did on its face, and without proof of innuendo, charge Mrs. Nolan with a heinous wrong, it may not be held libellous because it was shown to be true in every essential respect. The pamphlet stated: (1) That the newspaper owned by the Nolans accused the Communists of fomenting the strike (*that was in fact the newspaper's position* (T. 138)); (2) that the news-

paper received over $14,000 and food and clothing (*the paper did receive approximately $20,000 and food and clothing* (T. 121)); (3) that the money was sent as a result of a television broadcast about the plight of miners in the area. (*Mrs. Nolan conceded that the money was contributed as a result of television broadcasts* (T. 121) *at least one of which was "devoted almost exclusively to the unemployed coal miners"* (T. 122)); (4) that only $1100 of the money received by the newspaper was used to aid the striking pickets and none of the food and clothing was given to them (*the pickets received only $1100 from the fund and no food or clothing was distributed to them* (T. 133)); (5) that some of the food and clothing received was still undistributed and remained under lock and key (*some of the clothing was still undistributed at the time of the trial and was then in a warehouse under lock and key* (T. 121, 134)).

The Trial Judge, in commenting on the case with respect to the alleged defamation of Mrs. Nolan, said (T. 173):

> "She hadn't given the pickets but Eleven Hundred Dollars, and she hadn't distributed all of the things that had been sent. She does have part of them left, and what she's going to do with it, God Almighty only knows. I don't."

And the Trial Judge added that Petitioner "came pretty close (to the truth) on Mrs. Nolan" (T. 173) (language in parentheses ours).

As Mr. Justice Brennan wrote for the Court in *Garrison* v. *Louisiana*, 379 U. S. 64:

> ". . . We agree with the New Hampshire court in State *v.* Burnham, 9 N. H. 34, 42, 43, 31 Am. Dec. 217, 221 (1837):
>
> 'If upon a lawful occasion for making a publication, he has published the truth, and no more,

> there is no sound principle which can make him liable, even if he was actuated by express malice . . .' (379 U. S. at p. 73)
>
> * * * * * *
>
> ". . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned . . ." (379 U. S. at p. 74)

Since the verdict of guilty in this case was a general one without any special finding, it is not possible to identify the particular statement for which Petitioner was convicted and the verdict must be set aside if proof with respect to any of the three alleged libels was insufficient in law. In *Williams* v. *North Carolina,* the Court said, 317 U. S. 287, 291-292 (1942):

> "If one of the grounds for conviction is invalid under the Federal Constitution the judgment cannot be sustained. . . . To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

VI. A conviction and punishment for making inaccurate and derogatory statements about the official conduct of public officials violates the constitutional guarantees of freedom of the press.

The prevailing view of this Court, set forth in *New York Times* v. *Sullivan,* 376 U. S. 254, and in *Garrison* v. *Louisiana,* 379 U. S. 64, is that if constitutional safeguards are observed, there may be a criminal prosecution for the defaming of public officials with respect to their conduct in office. This case furnishes occasion for reconsideration

of that view. See *New York Times* v. *Sullivan*, 376 U. S. 254, 293, 297 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg) and *Garrison* v. *Louisiana*, 379 U. S. 64, 79 (concurring opinions of Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Goldberg).

For the reasons outlined, the questions presented are substantial, this Petition should be granted and plenary consideration of the issues is warranted.

Respectfully submitted,

EPHRAIM LONDON,
Attorney for Petitioner.

On the Petition,
EPHRAIM LONDON,
DAN JACK COMBS,
HELEN L. BUTTENWIESER.

APPENDIX A.

Opinion and Order.

Rendered June 18, 1965

COURT OF APPEALS OF KENTUCKY.

STEVE ASHTON,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

APPEAL FROM PERRY CIRCUIT COURT

HON. COURTNEY C. WELLS, JUDGE

OPINION OF THE COURT BY COMMISSIONER CLAY AFFIRMING.

Appellant was convicted of the *common law crime of criminal libel* and his punishment fixed at six months in jail and a $3,000 fine. The principal ground urged for reversal is that the nature of the offense was so "vague" and "inclusive" that appellant's conviction violated his constitutional rights of freedom of speech and due process.[1] This raises a novel and serious question which we will dispose of first.

The charge in the indictment is as follows:

> "On or about the 22nd day of March, 1963, in Perry County, Kentucky, the above named defendant committed the offense of criminal libel, by publishing a false and malicious publication which tends to degrade or injure Sam L. Luttrell, Charles E. Combs,

[1] Under the first and fourteenth amendments to the United States Constitution.

Mr. and Mrs. W. P. Nolan, against the peace and dignity of the Commonwealth of Kentucky."

Sam Luttrell was the chief of police of Hazard, Kentucky; Charles Combs was the sheriff; Mr. and Mrs. Nolan edited a local newspaper. The alleged defamatory matter appeared in a printed pamphlet entitled "Notes on a Mountain Strike", which was written by the defendant. He was a college student from Ohio who had come to Hazard to help unemployed miners in that area. This was a time of serious unrest in Perry County.

Although defendant raises some question about it, there is no doubt that the evidence proved "publication" of this pamphlet. The proof further establishes, and defendant admits, that certain statements therein, referring to the chief of police and the sheriff, were defamatory per se and were false. Though defendant contends the statements made about Mrs. Nolan (Mr. Nolan is not involved) were true, there was sufficient evidence that the statements accusing her of a breach of trust in the distribution of certain funds were in essence false.

By instructions to the jury the trial court made a most commendable effort to identify the crime more fully than was done in the indictment. To convict, the jury was required to find the defendant "did unlawfully publish * * * certain libelous and defamatory matter" which was "false and libelous, and was so known to be false and libelous when published by the defendant, and was written and published by him solely and for the purpose of bringing (the complaining witnesses) into great contempt, scandal, infamy and disgrace, and for the purpose of injuring, scandalizing and vilifying the name and reputation (of the complaining witnesses) * * *."

The court further instructed "that criminal libel is defined as any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when done, is indictable"; and that "malice" was

"an essential element of the offense". The jury was also advised that truth of the statements was a complete defense. These instructions were in fact so comprehensive in detailing different aspects of the crime (although omitting a definition of "malice") as to be somewhat confusing. However, defendant claims no specific error in the instructions.

The basic contention is that the case law of Kentucky does not adequately define the crime, and the trial court's attempt to delineate its elements was so vague, multifarious, and indefinite, and so inclusive of innocent acts, that the law lacks certainty with respect to the conduct condemned. Therefore, it is argued the conviction of the defendant deprived him of both the right of free speech and due process of law.

We will assume, although as far as we can discover after exhaustive research no case has decided this particular point, that the same certainty required of a criminal statute applies to a *common law crime*. See Sullivan *v.* Brawner, 237 Ky. 730, 36 SW 2d 364; Roberts *v.* United States, 226 F. 2d 464; Winters *v.* New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840; American Communications Association, CIO *v.* Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 1391.

It is true that the offense of criminal libel has been subjected to stress and strain through its long period of development since the existence of the Court of the Star Chamber in England around the year 1600.[2] A distinction was then recognized between defamation of a private person and a public official (which has continued to this day). With respect to the former, the real offense was the tendency of defamatory words *to incite a breach of the peace*. Where a public official was involved, criminality consisted

[2] The historical background hereafter given was taken principally from an article entitled Constitutionality of the Law of Criminal Libel, 52 Columbia Law Review 521 (1952), and an article, Seditious Libel; Myth and Reality, by Ervin Brandt, 39 New York University Law Review 1 (1964). Other texts examined have been Odgers on Libel and Slander (6th Ed.), and Newell, Slander and Libel (4th Ed.).

of the *scandalous attack upon the government.* This latter was *seditious* libel, a political offense,[3] and most prosecutions for criminal libel in the United States seem to reflect shadows of this long since discredited ground of criminality.

It has been roundly questioned whether there ever was actually a *common law* crime of seditious criminal libel in England,[4] or if so, whether it survived the first amendment to the federal constitution.[5] In any event, it is certain that the English crime, as such, was not imported into the United States. This conclusion is inescapable when we consider the elements of the English crime, which constitutions, statutes and court decisions have substantially modified. One could be guilty of criminal libel under the English law without a showing of (1) malice, (2) falsity, or (3) publication, and (4) without a jury's finding the published matter was libelous. That was the status of the so-called common law criminal libel of England when written constitutions were adopted in the United States. It was against this background that the right of freedom of speech was recognized.

The first amendment to the Constitution of the United States provides that: "Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *."

Section 1 (subsection four) of the Kentucky Constitution recognizes as an inalienable right of all men: "The right of freely communicating their thoughts and opinions."

Section 8, Kentucky Constitution, provides in part: "Every person may freely and fully speak, write and print

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[3] See Plucknett, A Concise History of the Common Law (5th Ed.) page 489.

[4] Seditious Libel; Myth and Reality, by Ervin Brandt, 39 New York University Law Review 1 (1964).

[5] Mr. Justice Holmes, dissenting, in Abrams *v.* United States, 250 U. S. 616, 630; concurring opinions of Justices Douglas, Black and Goldberg in Garrison *v.* Louisiana, ... U. S. .....; 85 S. Ct. 209, 13 L. Ed. 2d 125; Emerson, Toward a General Theory of the First Amendment, 72 Yale Law Journal 877, 924 (1963).

on any subject, being responsible for the abuse of that liberty."

Section 9, Kentucky Constitution, provides: "In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."[6]

The above passages clearly show that both federal and state governments were attempting in some manner to escape the abuses of criminal libel prosecutions in England when they were written into American constitutional law. Also, with adoption of these provisions, emphasis shifted from the protection of political institutions to the protection of the individual's right of free expression. As an original proposition it would have been neither difficult nor unreasonable for the courts of this country thereafter to conclude that the common law crime of criminal libel had not survived our federal and state constitutions. There is respectable authority for that view even today.[7]

However, the fact remains that the crime of criminal libel is recognized and enforced throughout the United States. While many states have made the offense a statutory crime, the courts of those states which have not legis-

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[6] This section of the Kentucky Constitution incorporated the two important provisions of Section 3 of the Federal Sedition Act of 1798, 1 U. S. Stat. 596, 597, which stemmed from the English Fox Libel Act of 1792, 32 Geo. 3, Ch. 60. The provision with respect to jury function did not effect any change in the mode of jury trial. Walston *v.* Commonwealth, 32 KLR 535, 106 SW 224.

[7] See the concurring opinions of Mr. Justice Douglas, Black and Goldberg in Garrison *v.* Louisiana, ... U. S. ....., 85 S. Ct. 209, 13 L. Ed. 2d 125; Irvin Brandt, Seditious Libel; Myth and Reality, 30 New York University Law Review 1; Emerson, Toward a General Theory of the First Amendment, 72 Yale Law Journal 877, 924.

lated on the subject have acknowledged the existence of the crime in its common law form.[8] In the only two cases we have found where the question was squarely presented as to whether the common law crime survived in the United States, the answer, after careful consideration, was in the affirmative. Commonwealth *v.* Whitmarsh (Mass. 1836), Thacher's Criminal Cases (page 441), and Commonwealth *v.* Chapman, 13 Mass. (13 Metcalf) 68 (1847).

In Kentucky, as heretofore noted, section 9 of the Constitution refers to "indictments for libel". Section 132 of the Criminal Code dealt with such indictments. In at least six Kentucky cases this Court has recognized the common law crime. Tracy *v.* Commonwealth, 87 Ky. 578, 9 SW 822 (1888); Smith *v.* Commonwealth, 98 Ky. 437, 17 KLR 1010, 33 SW 419 (1895); Browning *v.* Commonwealth, 116 Ky. 282, 76 SW 19 (1903); Commonwealth *v.* Duncan, 127 Ky. 47, 104 SW 997 (1907); Yancey *v.* Commonwealth, 135 Ky. 207, 122 SW 123 (1909); Cole *v.* Commonwealth, 222 Ky. 350, 300 SW 907 (1927). It is significant that in none of those cases did the defendants question the nature of the crime or the certainty of the elements of which it consisted. While the same questions were not involved in each case, and while in none of them do we find a comprehensive definition of criminal libel, they jointly recognize its four basic elements: (1) written words which are defamatory per se, (2) publication, (3) falsity, and (4) malice.

Some of these cases made reference to another aspect of the crime which defendant contends contributed to the vagueness and uncertainty of the law. This was the tendency of the defamatory words to lead to a "breach of the peace". In the Tracy case it was said "the publication is, in effect a breach of the peace". In the Duncan case it was said that the publication "was manifestly calculated to create a disturbance of the public peace". In the Browning case it was said "the publication amounts

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[8] Beauharnais *v.* Illinois, 343 U. S. 250, 265, 72 S. Ct. 725, 96 L. Ed. 919.

to an indictable offense, inasmuch as it tends to provoke violence and disturb the peace of society". In the Provident Sav. Life Assur. Soc. *v.* Johnson, 115 Ky. 84, 72 SW 754 (1903), a civil suit for malicious prosecution for criminal libel, the court said "a criminal libel is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable".

It is defendant's contention that to define the crime in terms of its tendency to cause a "breach of the peace" or lead to an indictable act is too indefinite to identify criminal conduct. There are two answers to this argument.

In the first place, the quoted statements from our cases simply refer to the *nature of the writing* which would constitute the basis of the charge of criminal libel. In those cases it was assumed that words which were defamatory per se were sufficiently offensive to be criminally libelous, provided the other elements of the crime were established. In those cases, as in the one before us, there was no issue concerning the defamatory nature of the published matter. Consequently the possible uncertainty of the concepts of "breach of the peace" or "indictable offense", as descriptive of the nature of defamatory matter, does not unstabilize the essential elements of the offense with which defendant was charged.

In the second place, in the development of the common law of criminal libel in the United States the offense is no longer founded, as it once was in England, upon the tendency of the defamatory words to cause a "breach of the peace" or to induce others to commit a public offense. It has been observed:

> "Whatever validity the former ground—keeping the peace—had historically was 'rejected with finality (over) fifty years ago.' Originally, criminal libel laws emphasized the state's concern with the prevention of sedition and turbulence. Even later expansion to ordinary or nonpolitical defamation

> could be explained as an effort to provide a substitute for the self-help remedy of the duel. After the passing of the custom of dueling, the common-law development could no longer be justified in terms of the interest in preservation of peace. Once truth was recognized as a complete defense, at least in the civil action, it was perfectly clear that the interest being served was no longer keeping of the peace.''[9]

The erosion of the ''breach of the peace'' justification for criminal libel laws was recognized in Garrison *v.* Louisiana, ... U. S. ....., 85 S. Ct. 209, 13 L. Ed. 2d 125. See also Emerson, Toward a General Theory of the First Amendment, 72 Yale Law Journal 877, 924 (1963).

In fact the ancient broad common law concept of what constituted a ''breach of the peace'' is no longer a constitutional basis for imposing criminal liability. Cantwell *v.* Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213; Garner *v.* Louisiana, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. See also Edwards *v.* South Carolina, 372 U. S. 229, 83 S. Ct. 680, 9 L. Ed. 697; Henry *v.* City of Rock Hill, 376 U. S. 776, 84 S. Ct. 1042, 12 L. Ed. 2d 79; Cox *v.* Louisiana, ... U. S. ....., 85 S. Ct. 453, 13 L. Ed. 471; Constitutionality of the Law of Criminal Libel, 52 Columbia Law Review 521, 528 (1952).

None of our Kentucky cases based the criminality of the act upon the tendency to cause a ''breach of the peace'' or the commission of an ''indictable offense''. To the extent they defined the defamatory nature of the words in these terms, they are obsolete. In our latest case on the subject, Cole *v.* Commonwealth, 222 Ky. 350, 300 S. W. 907 (1927), which perhaps came closer to defining the crime than any of our other opinions, no mention is made of the possibility

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[9] Libel and the First Amendment—A New Constitutional Privilege, by Arthur L. Berney, 51 Virginia Law Review 1, 40 (1965).

of public disturbance which might be incited by the publication.

We conclude, therefore, that defendant cannot fairly claim that an outmoded aspect of the impact of the defamatory words made uncertain the kind of conduct for which he was prosecuted and convicted.

As we have heretofore indicated, the common law crime of criminal libel recognized in Kentucky is basically the publication of a defamatory statement about another which is false, with malice. There is no uncertainty in the law about what constitutes (1) publication, (2) defamatory words, or (3) falsity. There is a certain indefiniteness concerning the nature of malice but we find this difficulty with that term throughout the criminal law.[10]

In Riley *v.* Lee, 86 Ky. 603, 11 ALR 586, malice was defined as the intentional publication of defamatory matter "without justifiable cause". This was a civil suit but it is a broad description of the mental state which constitutes actual malice in criminal libel. Wharton's Criminal Law and Procedure (Anderson's Edition), Vol. 2, section 879 (page 745); 33 Am. Jur., Libel and Slander, section 312 (page 249). The last cited authorities used the words "without legal (or lawful) justification or excuse". The definition in these terms is not very helpful because it leads us into a vast field of what constitutes justification or excuse.

A more workable analysis appears in Smith *v.* Commonwealth, 98 Ky. 437, 33 SW 419 (1895). That case involved the question of whether the jury should be instructed to find "malice". The Court held an instruction proper without use of this term when the jury was required to find that the publication was false and libelous and was "written and published by (defendant) solely and *for the purpose* of bringing the (prosecuting witness) into great contempt, scandal, infamy and disgrace". (Our emphasis.)

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[10] Mens Rea, 45 Harvard Law Review 974.

The United States Supreme Court has recently added an additional measure of malice in a criminal libel case where the defamatory words concern public officers and public affairs (which we have in the present case). In Garrison *v.* Louisiana, ... U. S. ....., 85 S. Ct. 209, 13 L. Ed. 2d 125, it was held that the state could not impose criminal sanctions for criticism of official conduct of public officials, even though false, unless the defamatory words were published "with knowledge of their falsity or in reckless disregard of whether they are true or false". This added another dimension to malice, although serious questions arise concerning its practical utility and proper application.[11] There is still an area of inevitable uncertainty in pinpointing the evil intent within the scope of the term.

We may point out that defendant does not contend the element of "malice" is so vague, or uncertain, or inclusive as to make unconstitutional his prosecution or conviction for criminal libel. We have discussed this matter because it has given us some concern and because it is significant on the next contention made by defendant.

It is argued there was no *evidence* offered to show that defendant's defamatory statements were made with "actual malice". That is what New York Times *v.* Sullivan, 376 U. S. 254, 84 S. Ct. 710, 95 ALR 2d 1412, 11 L. Ed. 2d 686, and Garrison *v.* Louisiana, U. S. , 85 S. Ct. 209, 13 L. Ed. 125, apparently require. However, neither of those cases required *independent* proof of malice. Obviously, unless the defendant had told someone of an evil motive or had voluntarily taken the stand and so testified, actual malice could be proved only as a state of mind made manifest by the nature of the defamatory words and the circumstances surrounding their publication. New York Times and Garrison do require the establishment of actual

[11] New York Times Co. *v.* Sullivan—The Scope of a Privilege, 51 Virginia Law Review 106.

malice (i.e., a calculated falsehood), by proof rather than presumption, but they lay down no constitutional standards with respect to the *sufficiency* of proof (although New York Times considered the question of sufficiency).

As we have intimated, if the defendant has not stated his motives to another person or has not taken the stand as a witness (as here), it is a practical impossibility to prove his knowledge, or reckless disregard of the truth, or his intent, or his purpose (all of which are subjective) except as a permissible inference which may reasonably be drawn from his particular conduct. Malice may be proved by circumstantial evidence as any other fact. Combs *v.* Commonwealth, Ky., 356 SW 2d 761.

In the present case the defendant was a stranger in the community. He was not acquainted with the prosecution witnesses. He had not personally confronted them with their claimed misconduct. Some of the statements made about them were clearly defamatory and they were false. This was a period of strife between union and non-union miners, and the defendant and the prosecuting witnesses were in opposing camps. From all these facts a jury, not necessarily but reasonably, could conclude that the defendant was motivated by actual malice: that is, he knowingly or in reckless disregard of the truth published these false statements for the purpose of exposing the prosecuting witnesses to public degradation.

It may be noted that the trial judge by his instructions required the jury to find malice in substantially these terms. Actually the instructions were more favorable to the defendant than the law required. The jury was required to find the defamatory matter was "known to be false", even though a reckless disregard of the truth would have carried the same imputation of wrongful conduct. The jury was also required to find that the defamatory matter was published "*solely* and for the purpose of" bringing the complaining witnesses into public degradation. This language was taken from Smith *v.* Commonwealth, 98 Ky.

437, 33 SW 419 (1895). It is not only ungrammatical but would seem to excuse the defendant if he could show some collateral purpose influencing his conduct. While we disapprove of the use of the word "solely" in the instruction, its inclusion favored the defendant. On this point we must conclude that the evidence, even though circumstantial, was sufficient to support a jury finding of actual malice.

It is next contended the indictment was fatally defective in that it did not set forth facts sufficient to constitute a criminal offense. The indictment is quoted at the beginning of this opinion. From our discussion of other problems arising in this case, it is apparent this indictment in substance sets forth all of the essential elements of criminal libel. It certainly conforms with the requirements of RCr 6.10(2).

Under RCr 6.22 defendant moved for a bill of particulars, which motion was denied. This was error. At least defendant was entitled to an accurate copy of the alleged libelous matter. Prior to the adoption of our new criminal rules, apparently this would have been an essential part of the indictment. Roberson's New Kentucky Criminal Law and Procedure, 2d Ed., section 1186 (page 1404). However, the denial of this motion was not prejudicial. There is no suggestion defendant was not fully aware that he was being prosecuted for the libelous matter, concerning the specifically named prosecuting witnesses, which appeared in "Notes on a Mountain Strike", or that he did not have a copy of this printed material. Defendant insists he was entitled to know "in what manner it was claimed publication was made" but this is quibbling over a relatively unimportant matter. We cannot find the denial of defendant's motion in any way prejudiced his defense.

The final contention is that the verdict was concurred in by only 10 members of the jury and was void because in violation of RCr 9.82 and RCr 9.88, which require a "unanimous" verdict. It is admitted by defendant that he voluntarily consented to a majority verdict before it was

rendered. It is claimed, however, that such consent or waiver violates the "ancient mode of trial by jury" (Section 7, Kentucky Constitution) and public policy.

The only answer of the Commonwealth to this argument, in its brief, is that since the record fails to show otherwise, we must presume the verdict was unanimous. We will assume, however, that only 10 of the 12 jurors agreed upon the verdict. Clearly defendant would have been bound by an agreement to honor the verdict of a 10-man jury. KRS 29.015 specifically authorizes the parties in a misdemeanor case to agree on a trial by a lesser number of persons than 12. The offense with which defendant was charged was a misdemeanor (KRS 431.060).

At first blush it would seem that if a defendant "may agree to a trial by a lesser number of persons" than 12 (KRS 29.015), an agreement to accept a verdict of the majority of a panel of 12 conforms with the statute. It is contended, however, that regardless of the number of jurors, the verdict of that specific number must be *unanimous*, as RCr 9.82(1) and RCr 9.88 provide.

Such view was taken in Hibdon *v.* United States, 204 F. 2d 834, wherein the court followed two lines of reasoning. It was first held that because of the mandatory phrasing of Federal Criminal Rule 31(a), which is substantially the same as RCr 9.82, the requirement of unanimity could not be waived. We are not inclined to accept this conclusion. A vast number of both civil and criminal procedural rules are mandatory in form, but unless they are jurisdictional in nature, or noncompliance will adversely affect the administration of justice, no reason is apparent why a party cannot understandingly and voluntarily waive their requirements.

The second line of approach in Hibdon was that under the ancient common law the defendant's guilt had to be proved beyond a reasonable doubt in order to overcome the presumption of innocence, and a verdict of only a majority of the jurors would not meet that requirement

since a dissenting vote would demonstrate the existence of a reasonable doubt. It was suggested that unless the court upheld this high standard upon which a conviction could be based, the prosecutor would have a lesser burden of proof and there might result unjust convictions. Assuming these speculations have some validity, the risk is one which the defendant voluntarily accepts.

The substance of the Hibdon opinion relating to the sacredness of a jury trial was keyed to a "humanitarian concept" and "due process". Emphasis was placed upon the historical background and the public interest in the protection of persons accused of crime. In our opinion the reasons making necessary extraordinary solicitation for the defendant's rights have long since disappeared. It will be remembered that under the common law the accused could not testify in his own behalf, he had no right to counsel, and the penalties were extremely severe, usually death. In Patton *v.* United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, it was pointed out the ancient doctrine that the accused could waive no rights was based upon those early conditions. Noting that they no longer exist, the United States Supreme Court decided the accused could waive a 12 man jury and properly agree to be tried by 11 jurors.

The Hibdon opinion sought to distinguish the Patton case and to distinguish between waiving the number of jurors and waiving unanimity. Accepting the latter distinction, we simply cannot find a persuasive reason for a different application of the waiver principle. We will take leave of Hibdon with the observation that the ultimate decision was based on an acceptable ground, i.e., the defendant was coerced into the agreement and therefore it was not voluntarily made. The preliminary conclusions in that opinion which we have discussed fall into the category of dictum. This does not condemn the reasoning but we are not inclined to follow it.

Opinion and Order.

We think the time has come to abandon the romantic aspects of the ancient mode of trial by jury and consider the matter pragmatically. No one questions the right of a defendant in a criminal case to invoke the protection of any or all of his constitutional rights. On the other hand, we can find no sound reason to deny him the right of waiving procedural requirements which exist principally for his benefit. We have recognized that he can waive a jury completely by pleading guilty. He can waive the right to counsel, the right to freedom from self-incrimination, the right to have excluded evidence obtained by unreasonable search or seizure, and at least in misdemeanor cases, the right to a 12-man jury. On what logical basis is unanimity a more sacred right?

It is true this Court has heretofore adhered to the theory that in *a felony case* the defendant cannot waive a 12-man jury. Branham *v.* Commonwealth, 209 Ky. 734, 274 SW 489; Tackett *v.* Commonwealth, Ky., 320 SW 2d 299. A serious question may be raised as to whether a valid distinction can be made between the waiver of defendant's rights in felony cases on the one hand and misdemeanors on the other. See Patton *v.* United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854; Waiver of Trial Jury in Felony Cases in Kentucky, 48 Ky. L. Journal 457. We do not have that question here and will not re-examine it.

It is our conviction that at least in misdemeanor cases the defendant may waive not only a 12-man jury but unanimity of the jurors in reaching their verdict, provided always that such waiver agreement is entered into *understandingly* and *voluntarily*, and provided of course the Commonwealth agrees and the trial court approves. Since no suggestion is made that the defendant in this case did not understandingly and voluntarily enter into the agreement to accept a majority verdict (and our solicitude for the rights of the defendant can be maintained by careful scrutiny of these two conditions), he was bound by his agreement. We find no error here.

We have considered carefully each of the six points raised in appellant's brief and find no reversible error.

The judgment is affirmed.

Chief Justice Moremen and Judges Stewart and Milliken dissent on the ground that since the English common law of criminal libel is inconsistent with constitutional provisions, and since no Kentucky case has redefined the crime in understandable terms, and since the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it should not be enforced as a penal offense in Kentucky.